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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

CBS, instead of directing its brief to the central question of whether the issues of antitrust and copyright law raised by the decision below are of sufficient importance to be reviewed by this Court, has filed a lengthy and unpersuasive brief on the merits. Indeed, CBS implicitly concedes the importance of the questions raised.

It does so by devoting the bulk of its brief to espousing a new theory of price fixing so unlimited in scope as to make virtually any cooperative or joint economic activity with any impact on price illegal *per se*. CBS contends that this extraordinary theory is commanded by decisions of this Court.

CBS also concedes that the Second Circuit's creation of a "market necessity" defense to illegal price fixing is worthy of review by this Court, but, says CBS, not in this case.

CBS, although conceding that the rationale of the decision below is incompatible with the Ninth Circuit's decision in *K-91*, sees no need for this Court to resolve the conflict.

Finally, CBS has not even tried to refute the showing made in the petition and supporting amicus briefs that the decision below threatens an important source of income of thousands of creators of music.

A decision which threatens thousands of creators, revolutionizes an industry, announces a new theory of price fixing and a new defense to price fixing, and conflicts with another Circuit's decisions should be reviewed by this Court.

I

The principal argument made by CBS is that the decision below is not worthy of review because the blanket license

> "presents as clear a case of illegality under Section 1 [of the Sherman Act] as could possibly be conceived." (CBS Br., p. 7).

Using even stronger language, CBS asserts:

> "We are dealing with an express, written agreement for the creation of a price-fixing mechanism as blatant and pervasive as any ever conceived." (CBS Br., p. 36).

CBS can make these claims only by ignoring history, the undisturbed findings of fact by the District Court and the pertinent legal authorities.

For example, contrary to CBS' suggestions on pages 8-9 of its brief: (a) ASCAP was not formed to fix prices; and (b) ASCAP does not either "determine" prices or arrive at its offers of license fees by dividing past aggregate payments of a licensee by the number of performances given by that licensee. CBS' brief distorts history and the trial record.

ASCAP was organized in 1914 to stop piracy, not to fix prices. ASCAP was an effort to find an effective way to solve the problems of creators of music, who were entitled to payment for the numerous and widespread performances of their works, and users of music who wished to perform musical compositions without infringing and without having to locate and negotiate with numerous copyright owners.

CBS, from 1929 until it brought this lawsuit, was a willing and active participant in the system it now claims is illegal.

Methods for arriving at reasonable license fees for an ASCAP license, by negotiation or by the District Court if negotiation fails, are regulated by the Amended Final Judgment in *United States* v. *ASCAP*. If those methods are a scheme which is "as clear a case of illegality . . . as could possibly be conceived," the Department of Justice has been an architect of and party to that "illegal scheme."*

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* The "blatant" illegality of ASCAP's activities in conformity with the provisions of the Amended Final Judgment went unnoticed by Judge Friendly in *United States* v. *ASCAP* (Shenandoah Valley Broadcasting, Inc.) 331 F.2d 117, 121 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964), when he wrote:

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before.

(footnote continued on next page)

Throughout the world, societies similar to ASCAP offer blanket licenses to users. This worldwide acceptance of blanket licenses argues for their convenience and usefulness and against CBS' claims of the "blatant" illegality of that form of license.

CBS' extravagant arguments cannot even be reconciled with the majority opinion below. After condemning the blanket license as price fixing, the majority, recognizing the utility of the blanket license, wrote (App. A, p. 22a):

> "The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others."

These words scarcely describe a "price-fixing mechanism as blatant and pervasive as any ever conceived."

And, finally, there are the undisturbed findings of fact that ASCAP's members *would* deal directly with CBS and *would* compete on a price basis, if CBS were to ask. Given these findings, it is wrong to slap the label "price fixers"

The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)."

on individual sellers who are *willing* and *free* to negotiate individual prices for their individual products in individual negotiations, simply because they simultaneously offer the convenience of a blanket license to those users who request it.

The universal use of the blanket license; the unwillingness of the majority below to place an absolute ban on the blanket license; the District Court's undisturbed findings that ASCAP's members are willing to deal directly with CBS, contrary to the majority's assumption that they would be "disinclined" to deal with CBS; and the fact that the decision below is an unprecedented interpretation, at once an expansion and a contraction, of this Court's price-fixing decisions all support plenary review.

II

In amplification of its claims concerning the "blatant" illegality of the blanket license, CBS argues that the ASCAP system is no more than an extension of the "garden-variety price-fixing conspiracy" that would exist if music publishers agreed among themselves, or appointed a committee, to sell music performance rights for $1,000 a use (CBS Br., p. 8).

But the plain fact is that ASCAP's members have not agreed among themselves on a single per-use price to be charged for their separate compositions. All they have done is agree to license collectively those users of music in bulk who wish to obtain ASCAP licenses.

Moreover, an ASCAP license is distinct and different from the product individual members of ASCAP could offer. The blanket license gives the user maximum flexibility and convenience in its use of music. When the user

takes that form of license, among other benefits which no individual member could offer, the user obtains music performance rights for *all* the existing compositions in the ASCAP repertory, for *all* compositions that may thereafter be created by every ASCAP member during the term of the license, and also for compositions of tens of thousands of members of foreign societies.

Viewed in this fashion, the decision below was not "clearly correct" nor was it mandated by prior decisions of this Court. Rather, the majority, by engaging in antitrust theorizing and ignoring the economic realities with which the District Court dealt, has placed in jeopardy any form of economic integration where two or more sellers sell their products jointly under circumstances in which the venture has no demonstrable anticompetitive impact and, indeed, provides a useful and convenient service.

CBS seeks to justify the decision below by asserting that it is difficult to imagine how any common selling agency which establishes package prices could be lawful (CBS Br., p. 29). CBS sees no reason for this Court to review a decision which condemns as *per se* illegal a whole range of economic activities. Prior decisions of this Court suggest a more rational approach: application of the Rule of Reason to the activities of common selling agencies.

The Rule of Reason was applied by the District Court. After a detailed study of the music industry, Judge Lasker found that the blanket license was not an impediment to price competition among ASCAP's members.

CBS' brief in this Court ignores the trial below—indeed, CBS writes as if it had prevailed on the facts in the District Court (*see, e.g.*, CBS Br., p. 25 fn. ". . . CBS also maintained, and, we believe, overwhelmingly established . . . .").

The central fallacy in the CBS brief (and in the decision below) is the assumption—contrary to undisturbed findings by the District Court—of an "economic axiom" that the blanket license has an "anticompetitive effect" and that "this [economic axiom] is not [even] a proposition which must be proven" (CBS Br., p. 13).

We respectfully submit that it is contrary to teachings of this Court to apply *per se* rules of illegality on the basis of so-called economic axioms after an "elaborate study of the industry" at trial has established that the "nature and necessary effect [of the blanket license is not] plainly anticompetitive"—indeed, that the blanket license has no impact on competition for a user such as CBS which may deal directly with ASCAP's members. *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1365 (1978). Yet, that was the process the majority below followed and which CBS seeks to justify.*

III

Although CBS concedes that "there is certainly a conflict in the reasoning" of the *K-91* decision and the decision below (CBS Br., p. 33), it argues that the conflict should not concern this Court because:

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* Judge Lasker, after an eight-week trial, found (App. B, p. 115a):

> ". . . CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

The majority below, without overturning any findings of the trial court, wrote (App. A, p. 22a):

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete."

The concurring judge, however, characterized this statement of the majority as an "assumption," thus far unsupported by the proof as he saw it (App. D, p. 125a).

(a) the reasoning of *K-91* is "self-evidently absurd" (CBS Br., p. 34);

(b) the *K-91* reasoning was undercut by the Solicitor General's amicus brief (*id.*); and

(c) the conflict is not of the sort

> "that generates uncertainties having a widespread and significant effect on important areas of conduct" (*id.*).

As we have shown in the petition, however, the conflict between circuits and its effect "on important areas of conduct" may not be so easily dismissed.

This Court should decide whether the reasoning of a Circuit Court of Appeals that ASCAP and its members, acting in conformity with the provisions of a Government consent decree, were not a price-fixing conspiracy was "absurd."

And, as to the Solicitor General's brief, there is simply no basis to conclude that the Government in 1968 was announcing its adherence to the novel proposition that illegal price fixing could be saved by a "market-functioning-necessity excuse" (CBS Br. p. 34). If there be any doubt, the Solicitor General's views should be obtained.

In these circumstances, this Court's denial of certiorari in *K-91*—thus letting stand a decision which, in CBS' view, was not only "absurd," but sanctioned a blatantly illegal price-fixing scheme which could be used by every industry in this country—is of more than routine interest.

Finally, as to the impact of the conflict, we have already shown the sure turmoil the decision below will cause in the music licensing world—a world consisting of thou-

sands of creators of music, both in this country and abroad and an even larger number of users, ranging from three television networks to the local taverns. Apart from the instances cited in our petition (p. 19),* since the date of its filing we have learned of users of ASCAP music in the general licensee category (restaurants, taverns, nightclubs, *etc.*) who are relying on the decision below to avoid any payment for copyrighted music.

The time for review is now—not years from now after federal courts all over the country have been inundated with plenary lawsuits, and counterclaims in infringement actions in which users assert that the unavailability of an ASCAP "per use" license devised to meet their particular needs entitles them to use copyrighted music for nothing.**

IV

As to the Second Circuit's espousal of a "market necessity" exception to illegal price-fixing, CBS concedes that the grant of certiorari might be provident in a case

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* In two cases, broadcasters have asserted they are entitled to special licenses because the ASCAP blanket license violates the antitrust laws. *Lerner* v. *Spanish International Communications Corp.*, 76 Civ. 4518 (S.D.N.Y.) (local television stations); *Alton Rainbow Corp.* v. *ASCAP*, 78 Civ. 352 (S.D.N.Y.) (local radio stations).

** CBS' Brief in Opposition describes in much detail the features of a "per use" license it proposes for itself (CBS Br., pp. 36-37 fn.). The problems with this description are too numerous to be dealt with here. We are content to point out, however, that under the CBS per-use proposal, unlike the present ASCAP system, the ASCAP members would appoint a "Committee" to make sales at a specified fee for each use, the only difference in fees depending upon the nature of the use (*e.g.*, feature, theme or background). Hence, the CBS per-use scheme is precisely the type of arrangement which CBS describes on page 8 of its brief as price-fixing "beyond peradventure." We are unaware of any doctrinal support for the proposition that, in the guise of remedying one price-fixing arrangement, the courts may decree a different price-fixing arrangement.

whose outcome depended on the existence of a "market necessity" for price fixing. But, says CBS, "this is plainly not such a case" (CBS Br., pp. 26-27).

We disagree and suggest that what is plain is that the "market necessity" exception was central to the reasoning of the majority and, thus, to the result. The "market necessity" exception, while it allowed the majority below to escape a total condemnation of the blanket license and to "harmonize" its result, if not its reasoning, with *K-91*, is bound to create the likelihood of confusion and needless litigation over the availability of such a defense in price-fixing cases.

Conclusion

The importance of the questions presented is shown by the petition, the briefs of amici and even by CBS' brief. The questions concern not only the creators of the world's music but all who engage in cooperative business activities. The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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